ORIGINAL

Before the
Federal Communications Commission

In the Matter of	)	
	)	
Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-258
	)	
Indecent Programming and Other Types of Materials on Cable Access Channels	)	

To: The Commission

REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

Viacom International Inc. (hereinafter "Viacom") by its attorneys, hereby submits its Reply Comments in response to the above-captioned Notice of Proposed Rulemaking. Viacom owns and operates cable television systems and, accordingly, will be directly affected by the outcome of this proceeding.

Viacom shares the concerns of many parties filing comments as to the serious First Amendment problems raised by the statutory provisions giving rise to this proceeding and the unavoidable practical difficulties that any implementing regulations must address. The purpose of this reply is to support approaches suggested by other comments that would minimize burdens and allocate responsibility for compliance in as fair and workable manner as possible given the fundamental flaws of the statutory requirements. Specifically, Viacom supports a system of certification as the starting point of the cable operator's response to requests for channel time by either commercial channel lessees or PEG access programmers. In addition, Viacom

believes that prior to airing an access program, the operator must have the right to be indemnified by the programmer against liability stemming from airing programming on the access channels.

Legal and Practical Problems of Section 624(i) of the Cable Act

Viacom agrees with the many commenting parties who have pointed out constitutional flaws and severe practical problems in the mechanism Congress chose to restrict children's access to indecent programming and to keep obscenity off of cable channels. The new statutory provisions are a travesty for everyone involved in access. The rules mandated by the statute will subject cable operators to responsibility and liability for the content of programming over which they otherwise are intended to have no editorial control. Furthermore, however the Commission implements the law, it will be almost impossible to avoid interfering with legitimate First Amendment rights of programmers who utilize the access channels.

Congress and the Commission already have provided sufficient protection for children by mandating availability of parental control devices. See 47 U.S.C. § 544(d)(2)(A) and 47 C.F.R. § 76.11. Letting parents decide what their children should watch and giving them the technical means to implement those decisions certainly seems a more effective

and constitutionally less restrictive way to achieve Congress' objective than involving cable operators and programmers in an extremely burdensome if not impossible task.

Recognizing, however, that Congress has mandated further Commission action, Viacom offers the following suggestions, which are intended to minimize the potential burdens of compliance.

Viacom's Recommendations

1. Standard for Indecent or Obscene Material. Viacom believes that given the unique characteristics of the cable medium, the only fair and workable test of "contemporary community standards" for obscenity or indecency must be based on the relevant "community" of cable subscribers. Because viewers must take the action of subscribing to cable service in order to view its programming, it is neither relevant nor appropriate to base the determination of whether material is legally indecent or obscene on the standards of individuals who are not subscribers to the service. As other comments have suggested, a single national standard is both appropriate and effective.

2. Prior Certification and Response: Like many of the commenting parties, Viacom believes that the decision of how to handle potentially indecent or obscene material in both leased and PEG access programming should start with

certification. Programmers seeking to use access channels should be required to certify, in writing and in advance, whether the programming does or does not contain indecent or obscene material.[1] It would not be unduly burdensome to place this responsibility on the programmer, which, in fact, is in a better position to know the content. The Commission has relied on programmer certification in other contexts for this very reason. (See, e.g., 47 C.F.R. § 76.225, Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd 2111, clarified on recon., 6 FCC Rcd 5093, 5697-98 (1991).

(a) If a leased access programmer refuses to execute the certificate, the operator has no choice but to treat the programs as if they contain indecent or obscene material.[2] Accordingly, the programmer would be justified in keeping the programming off the system altogether. Moreover, the potential presence of obscene material and the penalties for distribution of such material in Sections 558 and 559 of the

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[1] In the case of PEG access where an intermediate entity such as a nonprofit access group or governmental entity runs the channel(s), that group should be required to certify to the operator and, in turn, also would have the right to obtain certification from channel users.

[2] Cable operators should be entitled to rely on certification and should not be required to prescreen all access programming, because doing otherwise would entail great burden and expense, which, for PEG, could be reflected in higher basic subscriber rates; however, operators should not be prohibited from prescreening if they choose.

Act should be deemed grounds for keeping the programming off whenever confronted with a programmer's refusal to certify.

(b) If a leased access programmer certifies that the programming does contain indecent material, the operator either may keep it off the system pursuant to a written published policy or may place the programming on a sequestered, blocked channel to the extent that sufficient channel space is available [3]. If, on the other hand, the programmer certifies that the programming does contain obscene material, the cable operator may keep the programming off the system.

(c) If a leased access programmer certifies that the programming does not contain indecent or obscene material, the cable operator may deal with the channel request in its usual manner, with the result that such program could be aired on the system on a regular, unblocked leased channel. Of course, if the operator has independent grounds for believing that the programming contains indecent or obscene material notwithstanding the certification (for example, through voluntary prescreening, should the operator in its sole discretion elect to do so), the operator should be able to sequester the channel, or if only an isolated instance of

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[3] Viacom believes that operators be required to block no more than one of the channels designated for leased access for the purpose of distributing access programming pursuant to this provision.

indecent material, to block its transmission if sequestering is impractical. Again, however, the operator would not be in violation for relying on a false or inaccurate certificate in accordance with its normal procedures, because there is no obligation to prescreen.

(d) A similar approach should be followed for PEG access. Programmers seeking to use PEG channels should be required to certify, in writing and in advance, that their programming does or does not contain material of the sort prohibited by Section 532(c) of the Act. As in the case of leased access, when confronted with a request for PEG channel use, the operator's response depends on whether the programmer certifies that the programming does contain prohibited material; certifies that the programming does not contain prohibited material or refuses to certify.

3. Indemnification: Because the operator could be subject to serious liability in the event of an inaccurate or false certification, it is only fair that cable operators have the right to request indemnification from both leased channel and PEG programmers as part of the certification or channel use agreement. The operator should have the right to obtain appropriate indemnification before a program is aired. In addition, the operator should have the right to require reasonable assurance (through demonstration of a programmer's financial qualifications, insurance, bonds, or letters of

credit, for example) that the programmer executing the certificate and giving the indemnification is not judgment proof. Absent such indemnification and assurance, the operator has a right to sequester the program or keep it off.

Conclusion

Restrictions on access channel programming in the 1992 Act could impose untenable burdens on everyone involved. The Commission's rules should be aimed at clarifying the operator's obligations in determining the appropriate treatment for access programming. Another important objective for the rules is a fair and effective apportionment of responsibility for the consequences of noncompliance. The Commission has the opportunity to advance both of these objectives by adopting Viacom's recommendations.

Respectfully submitted,

VIACOM INTERNATIONAL INC.

By: 
Lawrence W. Secrest, III


Donna C. Gregg

Its Attorneys

WILEY, REIN & FIELDING
1775 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

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